LIBRARY
SUPREME COURT, U. S.

No. 898

JAN 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
v. *Appellants,*
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
and *Appellees,*
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., ET AL,
Intervenor-Appellees.

On Appeal From the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C. 20005
Attorneys for Appellant
THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017
Attorneys for Appellants
THE NATIONAL SMALL SHIPMENTS CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	5
Chronology	6
The Questions Are Substantial	8
Conclusion	14

Appendix A—Opinion of the District Court	1a
Appendix B—ICC Suspension Order of July 12, 1967	6a
Appendix C—Order Discontinuing Proceeding	9a
Apepndix D—Section 216(g) of the Interstate Commerce Act, 49 U.S.C.A. § 316(g)	10a
Appendix E—Rule 200, ICC Special Rules of Practice	12a
Appendix F—Organization Minutes—Assignments to Boards	13a
Appendix G—Special Permission No. M-94200	15a
Appendix H—I.C.C. Letter, August 16, 1967	17a

TABLE OF CASES CITED

Accelerated Transport-Pony Express, Inc. v. United States, 227 F. Supp. 815; affirmed 379 U.S. 4	10
American Trucking Associations v. United States, 364 U.S. 1	2
Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658	12
Associated Wholesale Grocers, Inc.—Investigation of Practices, 325 I.C.C. 631	10

Page

Atlantic Coast Line R.R. v. United States, 173 F. Supp. 871 13
Cancellation of Joint Fares Between District of Columbia and Nearby Virginia, 47 M.C.C. 205 12
Central and Southern Motor Freight Tariff Association v. United States, 273 F. Supp. 823 13
Eastern Central Motor Carriers' Association v. United States, 239 F. Supp. 591 13
General Increases—Middle Atlantic, 319 ICC 168 10
Southern Ry. Co. v. State of North Carolina, 376 U.S. 93 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees,

and

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., ET AL,
Intervenor-Appellees.

On Appeal From the United States District Court for the District of Columbia

---

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is reported at 287 F. Supp. 129 and is reprinted here in Appendix A. The relevent orders of the Board of Suspension of the Interstate Commerce Commission are unreported and are reproduced in Appendices B and C.

JURISDICTION

These suits were originally brought under 28 U.S.C. §§ 1336, 1398, 2284 and 2312-2325 to obtain mandatory injunctive relief relating to enforcement of orders entered by the Interstate Commerce Commission suspending the operation of general rate increase schedules published in two motor carrier territories. The three-judge district court entered judgment on July 22, 1968, dismissing the complaint in each of the two cases. Notice of appeal was filed in that court on September 20, 1968. Jurisdiction of the Supreme Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *Southern Ry. Co.* v. *State of North Carolina,* 376 U.S. 93; *American Trucking Associations* v. *United States,* 364 U.S. 1.

STATUTES INVOLVED

Section 216(g) of the Interstate Commerce Act (49 U.S.C. § 316(g)), in relevant part, provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate . . . the Commission is hereby authorized and empowered . . . to enter upon a hearing concerning the lawfulness of such rates . . . and pending such hearing and the decision thereon the Commission . . . may from time to time suspend the operation of such schedule and defer the use of such rate, . . . but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective.

Section 1336 of the Judicial Code (28 U.S.C. § 1336) provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Texts of the pertinent rules of the Special Rules of Practice of the Interstate Commerce Commission (Rule 200) and of the Commission's organization minutes (Sections 7.1, 7.3, 7.9) are set forth in Appendices E and F.

QUESTIONS PRESENTED

Under the statute which empowers the Interstate Commerce Commission to investigate and suspend the operation of a schedule stating a new rate, the Commission by its Board of Suspension entered an order suspending general rate increases. The carriers, without invoking the review procedure established by the Commission's Rules of Practice, announced that they chose not to defend the suspended schedules and cancelled them. Upon cancellation of the suspended schedules the investigation was discontinued. The order of suspension which deferred use of the rates for seven months was not vacated or modified. Immediately on cancelling the suspended rates, the carriers republished the identical rates in new schedules. The Commission accepted the newly-published schedules for filing, refused to entertain petitions to reject and strike such schedules from its files, and permitted the rates therein contained to become effective over protest. The appeal presents these questions:

1. Should the suspension provisions of 49 U.S.C. § 316(g) be construed as speaking only to the

schedules in which rates are published or to the *rates* themselves; and if the latter, are carriers who elect not to defend suspended rates and who cancel them, precluded from republishing the identical rates whose use was ordered deferred by the unrevoked suspension order?

2. Does an order discontinuing a proceeding entered by an Employee Board of the Commission terminate an order of suspension deferring the use of rates?

3. Is *enforcement* of an order of suspension entered under 49 U.S.C. § 316(g), as distinguished from *issuance* of an order of suspension, a matter committed to the discretion of the Commission and not subject to review by the three-judge court?

4. May the Commission, in disregard of the terms of its order of suspension and of its own Rules of Practice prescribing the procedure and time limits for review of a suspension order, accept and retain in its files, schedules that republish the suspended rates; or, is such action arbitrary, capricious, not in accordance with law and a failure to observe the procedure required by law?

5. May parties aggrieved by the Commission's action obtain mandatory injunctive relief based on enforcement of the terms of the outstanding suspension order or are they required to suffer rates effected in contravention of the suspension order while exhausting remedies under alternative formal complaint procedure?

STATEMENT

Appellants are three nationally-organized leagues representing many shippers and receivers of freight in the involved motor carrier territories. Two complaints filed with the three-judge court were consolidated for hearing and determination. They stem from these events: In June 1967 Rocky Mountain Motor Tariff Bureau, Inc. and Pacific Inland Tariff Bureau, Inc. filed general rate increases on behalf of motor carriers operating in the respective territories. They were met by shipper protests. The Commission's Board of Suspension issued an order of investigation and suspension on July 12, 1967 that deferred use of the rates to February 14, 1968 (Appendix B).

At this juncture the carriers had these courses open to them: (1) appeal within 20 days as provided in Rule 200 of the Commission's Special Rules of Practice (Appendix E) by filing a petition to vacate the order of suspension; (2) defend the suspended rates in the investigation proceeding; (3) elect not to defend by cancelling the suspended rates under a standing order of the Commission authorizing carriers to cancel matter under suspension on 10 days notice. (Appendix G). By letter dated July 19, 1968 the Pacific Bureau announced to Commission and protestants:

> "please be advised that member carriers do not choose to defend the general increases under suspension by order of the Commission."

On the same day, they issued a supplement to cancel the suspended rates. Rocky Mountain did not write a similar letter but did on July 20, 1967 issue a supplement to cancel the rates under suspension in their ter-

ritory. The following events then took place (outlined in the subtended chronology):

CHRONOLOGY

Civil Action No. 2358 - 67

ROCKY MOUNTAIN MOTOR TARIFF BUREAU

Original Publication of Increased Rates	Issued	6/10/67	Effective	7/15/67
Date of Suspension Order I&S M-21610	Dated	7/12/67	Served	7/14/67
Expiration of Suspension Period	——	——	Through	2/14/68
Cancellation Supplement	Issued	7/20/67	Effective	8/4/67
Republication of Increased Rates	Issued	7/27/67	Effective	8/29/67
Order of Discontinuance by Suspension Board	Issued	8/16/67	Served	8/22/67

Civil Action No. 3218 - 67

PACIFIC INLAND TARIFF BUREAU

Original Publication of Increased Rates	Issued	6/9/67	Effective	7/15/67
Date of Suspension Order I&S M-21611	Dated	7/12/67	Served	7/13/67
Expiration of Suspension Period	——	——	Through	2/14/67
Carriers' Letter of Election "not to defend"	Dated	7/19/67	——	——
Cancellation Supplements	Issued	7/19/67	Effective	8/3/67
Republication of Increased Rates	Issued	8/7/67	Effective	9/9/67
Order of Discontinuance by Suspension Board	Issued	8/16/67	Served	8/22/67

Eight days before the cancellation became effective in Pacific Inland territory and four days after it became effective in Rocky Mountain territory, the respective Bureaus issued fresh schedules containing rates that were identical with those placed under suspension by the order of July 12, 1967. The carriers had not petitioned to vacate the suspension order; nor was it revoked or modified in any way by the Commission. Indeed, the standing special permission order under which the carriers had implemented their election not to defend the rates by publishing cancellation supplements, stipulated that the permission granted does not waive or modify any outstanding formal order of the Commission or any provision of the Interstate Commerce Act. (Appendix G, paragraph 8)

There was thus outstanding and in force on the dates the carriers published these new schedules, a Commission order that, in the words of the statute, suspended the operation of the schedules and deferred the use of the rates (49 U.S.C. § 316(g)). Nine days after Pacific Inland published these new schedules and twenty days after publication in Rocky Mountain territory, the Commission's Board of Suspension issued an order discontinuing the investigation. This order was authorized by the Commission's Organization Minutes (Appendix F) which did not however delegate to the Board authority to vacate an order of suspension. Only Division 2 or the entire Commission could vacate the suspension order and they never did.

Protestants raised timely objection to the newly-published schedules. The Commission accepted the schedules for filing, refused to entertain petitions to reject and strike the schedules from its files, and permitted the rates therein contained to become effective

over protest. These suits were then instituted before the three-judge court to obtain mandatory injunctive relief by enforcement of the Commission's order of suspension.

The district court dismissed the complaints in the two cases. It viewed the suspension order of July 12, 1967 as rendered nugatory by the order of the Board of Suspension discontinuing the investigation proceeding, although that order was entered August 16, 1967, *after* the carriers issued the new schedules containing the suspended rates. Directing its discussion chiefly to the Commission's subsequent action in declining to suspend the republished rates, it held that such action was committed to the Commission's exclusive discretion and was not judicially reviewable; that plaintiffs could not invoke the court's review jurisdiction until they had exhausted remedies before the Commission in a formal complaint proceeding.

THE QUESTIONS ARE SUBSTANTIAL

In the regulation of rates, few remedial measures have been invoked as frequently or tested as assiduously as the Investigation and Suspension provisions introduced into the statute in 1910. Yet the pivotal phrase—"suspend the operation of such schedules and defer the use of such rate"—has not previously come before the courts for interpretation. The problem now arises in the context of a congeries of rate-actions that evoke the question whether it is to the schedules in which rates are published that the suspension order speaks, or to the rates themselves. The meaning imparted to the suspension order by both Commission and district court leaves the carrier free, in the face

of an unrevoked order suspending the operation of the schedule and deferring the use of the rate, to scrap the schedule by cancellation and blandly republish the identical rate. This is a result plainly at odds with the Congressional purpose, reflected in the legislative antecedents of Section 316(g), to shield the public from exactions of rates and charges that are, when published, attended by symptoms of unlawfulness sufficiently pronounced to call forth an order of suspension.

The district court, unwilling to accept the view that the suspension order was "outstanding," points to an order of discontinuance of the proceeding issued by a board of Commission employees. But the irreducible facts are these: revocation of a suspension order is an appellate function vested in a division of Commissioners (Rule 200, Appendix E) or is a power reserved by the Commission and never delegated to the board of employees. (Organization Minutes, Appendix F) The order of discontinuance, issued after the carriers announced their election not to defend the suspended rates and after cancellation of the rates, served to terminate the investigation and dispense with a hearing. It did not, and could not, reach the independently stated paragraph of the order of July 12, 1967 that suspended operation of the schedule (i.e. deferred the use of the rates) to and including February 14, 1968. (Appendix B). Termination of the investigation coupled with continuation of the suspension are results perfectly compatible with each other and entirely in harmony with the regulatory purpose. With defense of the rates abandoned by the carrier, no purpose would be served by further investigation and a hearing. Accordingly, on cancellation of the schedules by the carriers, the investigation may be routinely ordered

discontinued by the employee board. On the other hand, the suspension order recites:

> "upon consideration of the said schedules and protests thereto, there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act . . ."

In the presence of indicia of unlawfulness adverted to in the Commission's order, continuation of the suspension so as to defer the use of the rates to the end of the statutory period subserves the regulatory objective of preventing violation of the Act. There is thus not only rational meaning, but affirmative purpose in an order, of discontinuance that is addressed only to the investigation and leaves undisturbed and in continuing effect the order suspending use of the rates for a defined period. Countless examples of a similar approach (i.e. discontinuance of the proceeding coupled with a mandatory order of continuing effect) are found in the Commission's reports. *Associated Wholesale Grocers Inc.—Investigation of Practices,* 325 I.C.C. 631 (1965); *General Increases—Middle Atlantic,* 319 I.C.C. 168, 177 (1963) affirmed *sub nom. Accelerated Transport-Pony Express, Inc.* v. *United States,* 227 F. Supp. 815 (D. Vt., 1964), aff'd 379 U.S. 4.

Even if it is assumed, *arguendo,* that the Commission had conferred on its board of employees power to reverse itself by issuing an order vacating a suspension order, the facts, unmistakably clear from the chronology, are that at the times critical to the determination of this case the Board had not exercised any such power. On July 27th in the case of Rocky Mountain, and on August 7th in the case of Pacific Inland, the

carriers republished the increased rates which were under interdiction of the order of suspension. On that date (and for 20 days thereafter) *there was no order of discontinuance.* On the date the carriers presented their tariffs for filing, they were palpably in violation of the suspension order. In Rocky Mountain territory, cancellation of the suspended schedules had not even been effected. The tariffs as presented were illegal. It was the Commission's duty to reject them. These infirmities were fatal to republication of the rate increases. They were never cured, and could never be cured, by subsequent issuance of the order of discontinuance. The tariffs, illegal when filed, could not be legitimatized by subsequent entry of the order of discontinuance. That date—August 16, 1967—failed to provide the time needed for statutory compliance by tariffs, marked to take effect August 29, 1967, with the mandate of Section 217(c) of the Act requiring 30 days notice of any changes in rates. 49 USC § 317 (c).

The illegality in republication of suspended rates was timely brought to the Commission's notice by petition to reject the offending tariffs. Attention of the Court is invited to Appendix H setting forth the letter from the Acting Secretary of the Commission to counsel for the appellants. The letter is referred to by the Court below. (287 F. Supp. 129 at 131 Footnote 2; Appendix A, page 3a) The significant things in the letter are the dates. The letter is dated August 16, 1967. It refers to petition seeking rejection filed August 15, 1967. The letter dated August 16, 1967 states that: "By an order entered today, the proceeding was discontinued." On August 15th, when the petition to reject the tariffs were filed, the tariffs were undeniably illegal; the petition seeking rejection was incontro-

vertibly well founded. As the Commission itself has held, if a schedule tendered for filing is clearly unlawful in that it states rates in violation of a Commission order, no good purpose would be served by exercising powers of suspension; the schedule should be rejected. *Cancellation of Joint Fares Between District of Columbia and Nearby Virginia,* 47 MCC 205, 208 (1947). These schedules were illegally filed and improperly accepted by the Commission for its files. The Commission arbitrarily and capriciously refused to entertain the petition to reject the schedules and, as its letter states, the petition was "passed to the Commission's files without action". The district court's jurisdiction was invoked to implement Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, which requires the reviewing court to decide all relevant questions of law and statutory provisions, to compel agency action unlawfully withheld, and hold unlawful and set aside agency action found to be arbitrary, capricious or not in accordance with law and in excess of statutory limitations and without observance of procedure required by law.

Regardless of what discretion the Commission possesses in deciding whether or not to invoke its suspension power, once the discretionary power is exercised, as it was by the July 12 suspension order, enforcement of the resulting order is not a matter for Commission discretion. The district court, preoccupied with the irrelevant doctrine of the Commission's exclusive discretion to suspend, cited *Arrow Transportation Co.* v. *Southern Ry. Co.,* 372 U.S. 658 (1963), as controlling. The question was not whether the court could supersede on review Commission discretion not to suspend

the republished rate, but whether the republished rate must be rejected as illegal because of the infraction of an outstanding suspension order. The order of suspension deferred use of the rates. The reach of this order is sufficient to condemn the republished rates which, as a publication of the identical rates, was manifestly "use" of the rates placed under suspension.

Overall, resort by carriers to the suspend-cancel-republish procedure as a means of vacating the order of suspension was an evasion of the procedure for vacating an order of suspension established by Rule 200. (Appendix E) In acquiescing in the carriers' departure from its Rules of Practice and in refusing to enforce its July 12 suspension order, there was a denial of procedural due process. *Atlantic Coast Line R.R.* v. *United States,* 173 F. Supp. 871 (E.D. Va. 1958).

The lower court's statement regarding exhaustion of statutory remedies challenges reviewability of any order, including the suspension order here in issue, entered by the Commission in an investigation and suspension proceeding. This view is flatly contradicted by cases in which parties-protestant to an investigation and suspension proceeding, who have been denied relief, obtained judicial review of the Commission's decision without having pursued or exhausted the separate complaint remedy. *Eastern Central Motor Carriers' Association* v. *United States,* 239 F. Supp. 591 (D.C. 1965); *Central and Southern Motor Freight Tariff Association* v. *United States,* 273 F. Supp. 823 (D. Del. 1967).

CONCLUSION

Appellants suggest that decisive resolution is needed of the problems created by the action of the Commission and the decision of the district court with respect to the reach, the integrity and the enforcability of orders of suspension. The question presented by this appeal are substantial. They go to the vital substance of the remedial procedure established by Section 216 (g) of the Act.

Respectfully submitted,

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C.

Attorneys for Appellant

The National Industrial Traffic League

ARTHUR A. ARSHAM
233 Broadway
New York, New York 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, New York 10017

Attorneys for Appellants

The National Small Shipments Traffic Conference, Inc. and Drug & Toilet Preparation Traffic Conference

January 3, 1969

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 2358-67, 3218-67

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG & TOILET PREPARATION TRAFFIC CONFERENCE, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants* (two cases).

July 22, 1968

OPINION

Before BURGER and McGOWAN, Circuit Judges, and MATTHEWS, District Judge.

PER CURIAM.

In each of two cases before the court the plaintiffs assert that they seek to obtain enforcement of an order of the Interstate Commerce Commission suspending and deferring the use of certain increased motor carrier rates. The plaintiffs are organizations concerned with such carrier rates. The defendants are the United States of America, the Interstate Commerce Commission, and sixteen intervenors.[1] This three-judge court was convened pursuant to 28 U.S.C. §§ 2284, 2321-2325.

---

[1] The intervening defendants are: Rocky Mountain Motor Tariff Bureau, Inc., Pacific Inland Tariff Bureau, Inc., Acme Fast Freight, Inc., Arrow-Lifshultz Freight Forwarders, California Western Freight Association, Clipper Carloading Company, International Forwarding Company, Lifshultz Fast Freight, Merchant Shippers, Inc., National Carloading Corp., Republic Carloading & Distributing Co., Inc., Star Forwarders, Inc., Universal Carloading & Distributing Co., Inc., Western Carloading Co., Inc., Western Transportation Co., Inc., and Westland Forwarding Co.

To set the facts and issues in perspective a little background is necessary.

Each case originated when a motor carrier tariff bureau filed new rate schedules on behalf of its carrier members, the Bureau being Rocky Mountain Motor Tariff Bureau, Inc., in Civil Action No. 2358-67, and Pacific Inland Tariff Bureau, Inc., in Civil Action No. 3218-67. The schedules contained increases of 3% on truckload shipments and 5% on shipments of less than a truckload, and were to be effective July 15, 1967. Prior to that date, however, the Commission Board of Suspension in each case on July 12, 1967 issued an order instituting an investigation into the lawfulness of such increased rates, suspending the operation of the schedules, and providing that the use of such rates in interstate and foreign commerce be deferred through a specified date in February 1968, unless otherwise ordered by the Commission.

Shortly after the issuance of such order the motor carrier tariff bureau in each case filed new proposed tariffs republishing rate increases identical to those originally proposed, the effective date of the new proposed tariffs to be August 29, 1967 in one case and September 9, 1967 in the other. The purpose of this republishing procedure seems to have been to enable the bureaus to use more comprehensive data to justify the increased rates than had been submitted originally. Pursuant to the Commission's Special Permission No. M-94200, the original schedules containing such increased rates were cancelled by the bureaus on behalf of their respective carrier members, the effective date of such cancellation being August 4, 1967 in Civil Action No. 2358-67, and August 3, 1967 in Civil Action No. 3218-67. Thereafter on August 16, 1967 the Board of Suspension entered an order discontinuing the investigation and suspension proceedings as to the initial tariffs, the schedules containing them having been cancelled as above stated.

Following such discontinuance order, plaintiffs filed a petition for reconsideration. They alleged that in attempting to effectuate the increased rates by republication, the proponents of such rates had violated the "outstanding" suspension order of July 12, 1967 deferring the use of the same rate increases through a specified date in February 1968. The plaintiffs also moved for rejection of the republished rate increases or in the alternative that the suspension order as to the schedules originally published be amended to add the last proposed tariffs "as being subject to suspension." Division 2 of the Commission, acting as an Appellate Division, denied the petition of plaintiffs for reconsideration, and plaintiffs were notified that such action rendered moot their motion for rejection or amendment. The plaintiffs were also advised that the new schedules were "subject to protest and possible suspension based upon the record made."[2]

Upon consideration of the new record the bureaus made in justification of the schedules containing the republished rate increases, and of the protests and replies, the Commission Board of Suspension concluded in each case not to suspend the operation of such rate increases, and its action was sustained by Division 2 of the Commission acting as an Appellate Division. The plaintiffs might have filed a formal complaint with the Commission attacking the justness and reasonableness of the rates as they had a right to do under 49 U.S.C. § 316(e). Instead they filed the instant suits.

In each of the two suits plaintiffs seek to have the court enter an order directing the Interstate Commerce Commission (1) to strike from its filed and effective tariffs the schedules containing the republished increased motor car-

---

[2] Letter to Messrs. Donelan, Cleary and Caldwell, from the Acting Secretary of the Commission, dated August 16, 1967, attached as Exhibit 6 to plaintiffs' complaint in Civil No. 2358-67.

rier rates; (2) to reestablish as lawful the lower motor carrier rates which were effective prior to July 14, 1967; (3) to declare unlawful and subject to restitution the rates collected under the schedules republishing the increased motor carrier rates; and (4) to enforce the order of July 12, 1967 of its Board of Suspension by proceeding with the investigation and suspension of the original schedules of increased rates, plaintiffs' theory being that such order is valid and outstanding.

The defendants oppose the granting of the requested relief on the ground that the preliminary action of the Commission of which plaintiffs complain is well within the Commission's discretion and not subject to judicial review. Moreover, the defendants maintain that the plaintiffs have not exhausted their administrative remedies, and that the present actions are premature and should be dismissed. We agree.

[1] Under the July 12, 1967 order of the Commission Board of Suspension the increased motor carrier rates were initially suspended until a specified rate in February 1968, subject, however, to the further order of the Commission. Thereafter the tariff bureaus for the carriers, with the permission of the Commission, cancelled the said rates, and following such cancellation the Commission Board of Suspension entered an order in each case discontinuing the suspension proceeding. Under these circumstances we reject as without merit the claim of plaintiffs that the suspension order of July 12, 1967 is outstanding and should be "enforced".

[2] When the tariff bureaus on behalf of the carriers republished the same rates, the Commission in a new proceeding, on the basis of a new record, declined to suspend the rates. This action was discretionary with the Commission under the Interstate Commerce Act. 49 U.S.C. § 15(7). Refusal of the Commission to suspend the rates

is not judicially reviewable. Arrow Transportation Company v. Southern Railway Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963); Movers' & Warehousemen's Ass'n. v. United States, D.D.C., 227 F.Supp. 249 (1964); Carlsen v. United States, D.C. S.D.N.Y., 107 F.Supp. 398 (1952).

In the above cited Arrow case the Supreme Court held that Congress in giving the power of suspension of rates to the Commission "meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief," and that the "more plausible inference is that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." (Emphasis in opinion.) 372 U.S. 658, 667, 668, 83 S.Ct. 984, 988.

[3] The Commission's decision in each of the instant cases not to suspend the rates was necessarily only a preliminary determination. By complaint before the Commission as provided in the Interstate Commerce Act, the plaintiffs might have challenged the lawfulness of the rates. 49 U.S.C. §§ 13, 15. But they failed to exhaust the statutory remedies afforded them. No final agency action subject to judicial review was obtained by the plaintiffs before they sought to invoke the jurisdiction of this court.

Accordingly as to each of the two cases before the court, the complaint is dismissed.

APPENDIX B

Service Date
July 14, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 12th day of July, 1967.

INVESTIGATION AND SUSPENSION DOCKET No. M-21610
RATE INCREASES, ROCKY MOUNTAIN & TRANSCONTINENTAL TERRS.

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective July 15, 1967, designated as follows:

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., AGENT:

MF-I.C.C. No. 98: Supplement No. 18;
MF-I.C.C. No. 117: Supplement No. 17;
MF-I.C.C. No. 124: Supplement No. 4;
MF-I.C.C. No. 128: Supplement No. 9;
MF-I.C.C. No. 142: Supplement No. 2;
MF-I.C.C. No. 145: Supplement No. 8;
MF-I.C.C. No. 147: Supplement No. 2;
MF-I.C.C. No. 149: Supplement No. 2;
MF-I.C.C. No. 151: Supplement No. 7;
MF-I.C.C. No. 153: Supplement No. 2;
MF-I.C.C. No. 155: Supplement No. 45;
MF-I.C.C. No. 157: Supplement No. 6;
MF-I.C.C. No. 160: Supplement No. 1;

MF-I.C.C. No. 161: Supplement No. 5;
MF-I.C.C. No. 163: Supplement No. 1;
MF-I.C.C. No. 165: Supplement No. 2;
MF-I.C.C. No. 167: Supplement No. 6;
MF-I.C.C. No. 170: Supplement No. 1;
MF-I.C.C. No. 171: Supplement No. 1;
MF-I.C.C. No. 172;

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act;

and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant. In the event the said schedules are changed, amended or reissued upon termination of the suspension period and the investigation having not been concluded, such changed, amended or reissued schedules will be included in this investigation.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including February 14, 1968, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this in-

vestigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX C

Service Date
August 22, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 16th day of August, 1967.

DISCONTINUING MOTOR CARRIER INVESTIGATION AND SUSPENSION PROCEEDINGS

I. & S. No. M-21610

RATE INCREASES, ROCKY MOUNTAIN & TRANSCONTINENTAL TERRS.

I. & S. No. M-21610 (Sub No. 1)

RATE INCREASES, EAST MIDWEST & ROCKY MOUNTAIN POINTS

I. & S. No. M-21611

INCREASED RATES AND CHARGES, PACIFIC INLAND TERRITORY

I. & S. No. M-21612

INCREASED RATES, ARIZ., CALIF., N. MEX., NEV., ORE., TEXAS

I. & S. No. M-21612 (Sub No. 1)

INCREASED RATES, POINTS IN ARIZONA, NEW MEXICO & TEXAS

It appearing, That by orders in the above-entitled proceedings, the Commission, Board of Suspension, entered into investigations concerning the lawfulness of classifications, rates, charges, regulations or practices stated in the schedules designated in the said order, and suspended the

operation of the said schedules to the dates specified in the said orders;

It further appearing, That the respondents under special permission filed schedules cancelling the schedules under suspension in the said proceedings:

It is ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission, Board of Suspension.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX D

Section 216(g) of the Interstate Commerce Act. 49 USCA § 316(g)

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such sched-

ule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or pracitce goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable.

APPENDIX E

INTERSTATE COMMERCE COMMISSION SPECIAL RULES OF PRACTICE

Rule 200 (49 C.F.R. 1100.200)

Special Rules of Practice governing procedure in certain suspension and fourth-section matters

(a) The proceedings of the Board of Suspension and the Fourth-Section Board shall be informal. . . .

(b) Petitions for reconsideration of orders of the following may be filed by any interested person within 20 days after the date of the service of the order: (1) Board of Suspension . . . (4) Division 2 suspending schedules . . . except as to said subparagraph (4) of this paragraph respecting which an original and 14 copies are required, the original and 6 copies of any pleading, document or paper filed under this section shall be furnished for the use of the Commission. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 20 days after the filing of such petition with the Commission, but if the facts stated in any such petition disclose a need for accelerated action, such action may be taken before expiration of the time allowed for reply. In all other respects, such petitions and replies thereto will be governed by the Commission's general rules of practice.

APPENDIX F

ORGANIZATION MINUTES [1]

Assignments to Boards

7.1 The following portions of the work, business, and functions of the Commission are assigned to Boards of employees. Such portions relate to proceedings or classes of proceedings that do not involve issues of general transportation importance. The right to apply to the Commission for rehearing, reargument or reconsideration of a decision, order or requirement of an appellate division upon a petition filed by a party to the original order, action or requirement of any such board is restricted under the authority granted by section 17(6) of the Interstate Commerce Act as herein provided.

. . .

7.3 *Board of Suspension:*

Section 15(7), 216(g), 218(c), 307(g) and (i), and 406(e), relating to the initial disposition (1) by declining to suspend or (2) by entering an order of investigation or (3) by entering an order of investigation and suspension, either on its own motion or on petitions or requests for suspension of schedules and tariffs, and relating to authority to institute investigations into rates, fares, charges, and practices of carriers under Parts I, II, III, and IV, as ancillary to such investigations or such investigation and suspension proceedings; and the authority, prior to submission of evidence, to enter orders discontinuing any proceeding when the schedules or tariffs under which the proceeding arose have been cancelled. This delegation of authority shall not include: (1) petitions or requests relating to schedules or tariffs filed in purported compliance with any decision or order of the

[1] 30 F.R. 11189, 12559 and 13302; 31 F.R. 242, 4762, 9529, 12693,

Commission or a division thereof, or (2) any action in connection with suspensions to be taken during or after formal hearings or investigations. The Board may certify to Division 2 any matter which, in its judgment, should be passed upon by that division or the Commission.

. . .

Item 7.9 *Special Permission Board:*

Special permissions or other permissible waivers of rules regarding schedules of rates, etc. under section 6(3), 217(c), 218(a), 306(d), 306(e) and 405(d), including authorization for the cancellation of suspended tariffs or schedules, which have not involved the taking of testimony at a public hearing or the submission of evidence by opposing parties in the form of affidavits. The Board may certify to Division 2 any matter which, in the Board's judgment, should be passed upon by that division, and Division 2 may recall any matter from the Special Permission Board.

APPENDIX G

SPECIAL PERMISSION NO. M-94200
(Revised May 10, 1967)

CANCELS

SPECIAL PERMISSION NO. M-94200
(Issued May 3, 1955, as amended)

CANCELLATION OF TARIFF MATTER UNDER SUSPENSION

At a Session of the INTERSTATE COMMERCE COMMISSION, Special Permission Board, held at its office in Washington, D. C., on the 10th day of May, 1967.

Upon further consideration of the matters and things involved, Special Permission No. M-94200 of May 3, 1955, and Amendments 1 through 10 thereto, issued to National Motor Freight Traffic Association, Inc., Agent;

IT IS ORDERED, That Special Permission No. M-94200, be, and it is hereby, revised, for the purpose of reflecting changes in Paragraph one (1) thereof, as amended, regarding notification being made concurrently upon such cancellation of suspended matter, also for the purpose of bringing forward into this revised order all presently applicable provisions, as follows:

1. All common carriers of property by motor vehicle in interstate or foreign commerce and their duly appointed agents are hereby authorized to issue, post and file supplements (to bound tariffs) or revised pages (to loose-leaf tariffs) to their respective tariff or tariffs, such supplements or pages to provide for the cancellation of matter under suspension or suspended matter which is under postponement, and to be made effective prior to the date to which suspended or postponed (whichever is later) and upon not less than ten days' notice;

Provided that the carrier or its duly appointed agent shall concurrently with the filing of such cancellation notify, (1) all parties of record in the said proceeding, and (2) the Office of Proceedings, Interstate Commerce Commission, Washington, D. C., 20423, by telegram or letter, giving reference by I. & S. Docket Number and by MF-ICC Number to the tariff, supplement or revised page effecting the cancellation and the effective date thereof, except as provided below:

. . .

8. This permission does not, except as expressly indicated, waive or modify any outstanding formal order of the Commission, any of the requirements of its published rules relative to the construction and filing of tariffs, or any of the provisions of the Interstate Commerce Act, nor does it authorize the filing of any publications other than those referred to herein. This permission shall continue in force and effect to and including July 1, 1970.

By the Commission, Special Permission Board.

(SEAL)

H. NEIL GARSON
Secretary

To: National Motor Freight Traffic Association, Inc., Agent
Bryce Rea, Secretary
ATA Building, 1616 P Street, N. W.
Washington, D. C. 20036

ETS:lmd

APPENDIX H

INTERSTATE COMMERCE COMMISSION
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20423

August 16, 1967

Messrs. John F. Donelan, John M. Cleary
and John H. Caldwell
The National Industrial-Traffic League
914 Washington Building
Washington, D. C. 20005

Gentlemen:

This has reference to your petition of August 15, 1967, seeking rejection of various supplements and tariff MF-I.C.C. No. 173 published by Rocky Mountain Motor Tariff Bureau, Inc., Agent, to become effective August 29, 1967, or in the alternative, amendment of the suspension order in Investigation and Suspension Docket No. M-21610 to include such supplements and tariff.

The schedules suspended by the order in the proceeding referred to, as you know, were canceled effective August 4, 1967, under an outstanding special permission, and by an order entered today, the proceeding was discontinued. Your petition will accordingly be passed to the Commission's files without action.

The schedules to which you refer, published to become effective August 29, 1967, are, of course, subject to protest and possible suspension based upon the record made.

Sincerely yours,

ANDREW ANTHONY, JR.
Andrew Anthony, Jr.
Acting Secretary

cc: Mr. Everett C. Funk, General Manager
Rocky Mountain Motor Tariff Bureau, Inc.
P. O. Box 5746, Terminal Annex
Denver, Colorado 80217

TABLE OF CONTENTS

Page

Motion to Affirm 1

Statement 1

Argument 4

Conclusion 7

TABLE OF CITATIONS

CASES:

Arrow Transportation Company v. *Southern Railway Co.*, 372 U. S. 658 (1963) 4

Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282 (1934) 4

Myers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938) 4

Sprunt & Son, Inc. v. *United States*, 281 U. S. 249 (1930) 4

United States v. *Illinois Central Railroad Co.*, 291 U. S. 457 (1934) 4

STATUTES:

Interstate Commerce Act:

Section 204(c) (49 U.S.C. Section 304(c)) 4

Section 216(e) (49 U.S.C. Section 316(e)) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, et al.,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

Pursuant to Rule 16, paragraphs 1(c) and 1(d), of the Revised Rules of this Court, Rocky Mountain Motor Tariff Bureau, Inc., moves that the unanimous judgment of the district court be affirmed on the following grounds:

1. The questions on which the decision depends are so unsubstantial as not to need further argument.

2. The appellants failed to exhaust their administrative remedies.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to have the court declare that rates and charges in tariff schedules on file with the Interstate Commerce Commission are unlawful and that the lawful rates

and charges are those in schedules which were in effect prior to July 14, 1967. The appellants also asked the court to vacate and set aside certain procedural orders of the Interstate Commerce Commission.

Shortly prior to their filing of the complaint in the district court, the appellants had filed petitions with the Interstate Commerce Commission asking the Commission to suspend or to reject the tariff schedules that had been filed with the Commission and scheduled to become effective August 29, 1967. The Commission determined that the schedules should not be suspended or rejected and permitted them to become effective. There was no hearing before the Commission at which the parties presented evidence and none of the Commission's orders or decisions was adjudicative. Thus, the appellants asked the district court, without the benefit of the Commission's expertise and in the absence of any evidence, to make an initial determination that the rates were unlawful.

On July 12, 1967, the Commission had suspended in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.*, tariff schedules setting forth increased rates and charges in the tariffs involved in this proceeding and nine other tariffs (JS 6a). The second and fourth ordering paragraphs of the Commission's order read:

> *It is further ordered,* That the operation of the said *schedules* be and it hereby is suspended, and that the use thereof in interstate and foreign commerce be deferred to and including February 14, 1968, *unless otherwise ordered by this Commission.*
>
> *It is further ordered,* That neither the *schedules* hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, *unless otherwise ordered by the Commission.* (Italics supplied)

The motor carriers decided to withdraw and cancel the tariff schedules that had been suspended and to re-examine their position in the light of additional data which had become available. Pursuant to an order of the Commission designated as Special Permission No. M-94200, dated May 3, 1955, as amended, the motor carriers published new tariff schedules cancelling all of the schedules that had been suspended in Investigation and Suspension Docket No. M-21610. Thereafter, the Commission, Board of Suspension, issued an order dated August 16, 1967, which discontinued the proceeding in I. & S. Docket No. M-21610 after finding that the respondents under special permission had filed schedules cancelling the schedules under suspension (JS 9a, 10a). The Commission, division 2, denied a petition filed by two of the appellants for reconsideration of the order discontinuing the proceeding.

The motor carriers published new tariff schedules providing for a general increase in rates and charges against which the appellants filed their petitions for suspension. Before the publication was made, the Interstate Commerce Commission specifically approved the form of those schedules by its order designated as Special Permission No. 68-383-M (Exhibit 12 attached to complaint).

The appellants asked the district court to enter its order and decree enjoining, annulling, setting aside and vacating the order of the Commission, Board of Suspension, dated August 16, 1967, in I. & S. Docket No. M-21610 and urged that the Commission's actions in granting special permission orders and permitting short notice cancellation of previously suspended schedules were arbitrary, capricious and a clear abuse of discretion (Complaint, paragraphs 7.04 and 5.11).

The appellants failed to introduce in the district court a certified copy of the record of the proceedings before the Interstate Commerce Commission or of any part of that record.

ARGUMENT

The Interstate Commerce Commission has primary jurisdiction. *Mississippi Valley Barge Line Co. v. United States,* 292 U. S. 282, 286-7 (1934); *United States v. Illinois Central Railroad Co.,* 291 U. S. 457, 463 (1934); *Meyers v. Bethlehem Shipbuilding Corporation,* 303 U. S. 41, 50 (1938). In *Sprunt & Son, Inc. v. United States,* 281 U. S. 249, 255 (1930) this Court held:

> Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy.

Sections 204 (c) and 216 (e) of the Interstate Commerce Act (49 U.S.C. Sections 304(c) and 316(e)) grant to any person, State board, organization or body politic the right to make complaint in writing to the Interstate Commerce Commission that any motor carrier has failed to comply with any provisions of the Act or any requirement established pursuant thereto, or that any rate, rule, regulation or practice in effect is in violation of the Act. The Commission is empowered to enter upon an investigation to determine the issues raised by the complaint and to enter the appropriate order based upon its findings.

Instead of availing themselves of the administrative remedies accorded by the Act, the appellants filed their complaint seeking to have the district court render a decision on a mattter clearly within the primary jurisdiction of the Commission. *Arrow Transportation Company v. Southern Railway Co.,* 372 U. S. 658 (1963), sustains the district court's holding that the Commission's determination not to suspend is not judicially reviewable. The Commission's decision not to suspend was necessarily a pre-

liminary decision. The appellants could have challenged the lawfulness of the rates, but they failed to exhaust the statutory remedies afforded them.

In the district court the appellants sought judicial review of a number of orders or procedural rulings of the Interstate Commerce Commission, including the orders of the Commission, Board of Suspension, dated July 12, 1967, and August 16, 1967, in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.* On these two orders of the Commission, Board of Suspension, the appellants have attempted to establish the substantiality of the questions they have raised on appeal. A brief analysis of the orders refutes appellants' contentions.

As shown in the second ordering paragraph of the order of July 12, 1967, it was the operation of the designated schedules that was suspended and the use thereof was deferred to and including February 14, 1968, unless otherwise ordered by the Commission. That order further provided in the fourth ordering paragraph that neither the schedules suspended nor those sought to be altered thereby could be changed until the proceeding had been disposed of or until the period of suspension had expired, unless otherwise ordered by the Commission.

All of the schedules that were embraced in the Commission's order of July 12, 1967, were cancelled by other schedules pursuant to the order of the Commission designated as Special Permission No. M-94200. All rates and charges, which were integral parts of the schedules, ceased to exist when the schedules were cancelled.

The order dated August 16, 1967, recited that the suspended schedules had been cancelled pursuant to special permission of the Commission and discontinued the proceedings in I. & S. Docket No. M-21610 (JS 9a and 10a). The Board of Suspension was specifically authorized by the Organization Minutes of the Interstate Commerce Com-

mission to issue the order discontinuing the proceedings (JS 13a). Two of the appellants petitioned for reconsideration of the order discontinuing the proceeding. The Commission, division 2, denied the petition for reconsideration by its order dated August 24, 1967. In that order the Commission specifically found that the schedules the operation of which had been suspended were cancelled in full. The Jurisdictional Statement makes no reference to the order denying reconsideration. A copy of the order is attached hereto as Appendix A.

Although they asked the district court to enjoin, annul, set aside and vacate the order of the Commission, Board of Suspension, dated August 16, 1967 (Complaint, paragraph 7.04), the appellants now recognize the validity of that order. On appeal, they admit that the order served to terminate the investigation and dispense with a hearing (JS 9). The Commission ordered that the "proceedings be, and they are hereby, discontinued" (JS 10a). When all of the schedules that had been suspended in I. & S. Docket No. M-21610 were cancelled, there was nothing to investigate. The issues in that proceeding were moot and the Commission appropriately discontinued the proceeding. The appellants, however, now argue that notwithstanding the discontinuance, the suspension lingered on. The argument is fallacious. The designated schedules were suspended to and including February 14, 1968, unless otherwise ordered by the Commission (JS 7a). That date has long since passed and the Commission did otherwise order.

CONCLUSION

Since this appeal presents no issue warranting plenary consideration and since the appellants failed to exhaust their administrative remedies, the judgment of the court below should be affirmed.

Respectfully submitted,

LeGrand A. Carlston
Z. L. Pearson, Jr.
Gerald M. Werth
4045 Pecos Street
P. O. Box 5746, Terminal Annex
Denver, Colorado 80217

Bryce Rea, Jr.
917 Munsey Building
Washington, D. C. 20004
Attorneys for Appellee

January 30, 1969

APPENDIX A

SERVICE DATE
AUGUST 25, 1967

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 24th day of August, 1967.

INVESTIGATION AND SUSPENSION
DOCKET NO. M-21610

RATE INCREASES, ROCKY MOUNTAIN & TRANSCONTINENTAL TERRS.

IN THE MATTER OF A PETITION FOR RECONSIDERATION OF AN ORDER DISCONTINUING THE TITLED PROCEEDING

Upon consideration of a petition filed August 18, 1967, by the National Small Shipments Traffic Conference, Inc., and the Drug and Toilet Preparation Traffic Conference for reconsideration of the order discontinuing the proceeding in Investigation and Suspension Docket No. M-21610, *Rate Increases, Rocky Mountain & Transcontinental Terrs.*, and;

It appearing, That the schedules the operation of which had been suspended by an order in said proceeding, were canceled in full, effective August 4, 1967, and that sufficient grounds have not been presented to warrant the action sought; Therefore,

It is ordered, That the petition for reconsideration of the order of discontinuance entered by the Commission, Board of Suspension, on August 16, 1967, be, and it is hereby, denied.

By the Commission, Division 2, acting as an appellate division.

H. NEIL GARSON,
Secretary

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a-5a, reported at 287 F. Supp. 129) dismissing the appellants' consoli-

dated suits with respect to certain orders of the Interstate Commerce Commission. Those orders had initially suspended proposed motor carrier rate schedules; although the orders were annulled by the Commission when the motor carriers cancelled the schedules, the appellants (shippers) sued to "enforce" them.

The factual context of this case is simple and undisputed. In 1967, two motor carrier tariff bureaus filed with the Commission new rate schedules on behalf of their carrier members, proposing 5 percent increases on less-than-truckload and any-quantity traffic and 3 percent increases on truckload and volume traffic. Upon consideration of protests filed by a number of shippers and shipper associations, including appellants, the Commission's Board of Suspension issued an order (pursuant to Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g)) instituting an investigation into the lawfulness of the proposed rates and suspending the schedules for the statutory maximum period of seven months, subject, however, to possible further orders of the Commission (J.S. 6a-8a). Recognizing that they had not sufficiently supported the lawfulness of the proposed rates, the tariff bureaus notified the Commission that, pursuant to the Commission's standing Special Permission No. M-94200 (J.S. 15a-16a), they were cancelling the schedules.

Thereafter, the tariff bureaus republished the same rate increases in new proposed tariffs, and submitted comprehensive material explaining the bases for the proposed rate increases and including current data

on costs and revenues. Shortly after the new tariffs had been filed but before they were to become effective, the Commission's Board of Suspension, noting that the carrier bureaus had cancelled the original schedules, discontinued the investigation-and-suspension proceedings (J.S. 9a-10a). Appellants thereupon filed (1) a petition for reconsideration of the Board's order discontinuing the investigation-and-suspension proceedings, and (2) motions to reject the new tariffs or to amend the earlier investigation and suspension order, urging that the earlier order applied to the new tariffs. The petition for reconsideration was denied by Division 2 of the Commission, acting as an Appellate Division, and appellants were notified that such action rendered moot their motions for rejection or amendment of the new tariffs (J.S. 3a).

Appellants and others then filed protests to the new schedules, but upon consideration of those protests and the carrier bureaus' new justifications, the Commission's Board of Suspension decided not to suspend or investigate. Appellants sought reconsideration of this decision, and Division 2 of the Commission, as an Appellate Division, sustained the determination not to suspend the schedules but concluded that one of the schedules should be investigated to determine the lawfulness of its rates.

Thereafter, appellants filed complaints in the district court, seeking "enforcement" of the initial investigation-and-suspension order. The three-judge district court unanimously dismissed the complaint. Appellants' principal contention was that the original suspension order remained outstanding and thus ren-

dered unlawful the republication of new tariffs proposing the same rates. The district court rejected this argument as without merit, noting that the entire suspension proceeding had been terminated (J.S. 4a). The court also held that the decision not to suspend the new rate schedules was unreviewably committed by statute to the Commission's discretion (J.S. 4a-5a) and that appellants' complaints were premature in light of the availability of appropriate administrative remedies to test the lawfulness of the new rates (J.S. 5a).

ARGUMENT

1. The court below correctly recognized (J.S. 4a-5a) that appellants' position seeks to evade the settled law that the Interstate Commerce Act confers upon the Commission exclusive discretionary power to determine whether or not to suspend and investigate a proposed rate change. *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 667-668. Appellants, who unsuccessfully sought to have the Commission suspend the second proposed rate increases, now seek the same goal by indirection.[1] Their suits purport to seek "enforcement" of the original investigation-and-suspension order of the Board of Suspension. But this order was clearly annulled when, following cancellation of the tariffs under suspension, the Board discontinued the proceedings entirely.[2] Thus, the relief

[1] See, *e.g.*, *White* v. *Cotzhausen*, 129 U.S. 329, 344.

[2] Moreover, since Section 216(g) of the Act, 49 U.S.C. 316 (g), permits suspension of a schedule only for seven months

appellants seek (see J.S. 3a-4a) would necessarily involve setting aside the subsequent orders of Division 2 declining to reconsider the Board's vacation of its investigation-and-suspension order or to suspend the newly filed and additionally supported schedules. The court below thus correctly concluded that these suits are impermissible attacks on the Commission's "sole and exclusive power" to suspend or not to suspend proposed rates and that Congress has "withdraw[n] from the judiciary" any review of the Commission's discretion in this regard. *Arrow Transportation Co.* v. *Southern Ry. Co., supra,* 372 U.S. at 667.[3]

2. Appellants point out that the initial investigation-and-suspension order had not yet been formally vacated when the carriers republished the increased rates in new tariffs (J.S. 10-12), and from this they argue that republication of identical rates was improper. But it is clear that republication was effected *after* the carrier bureaus, acting pursuant to a special permission (J.S. 15a-16a) of the Commission, had cancelled their original schedules, and the new schedules were not to become *effective* until *after* the investigation-and-suspension proceedings had been discon-

---

from the date the schedule would have taken effect (here, July 15, 1967; see J.S. 6), and since the period cannot be extended by the Commission or the courts (*Arrow Transportation Co.* v. *Southern Ry. Co., supra*), the initial suspension order expired on February 15, 1968, by operation of law and could not thereafter have been judicially enforced.

[3] See, also, *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977, 980-981 (W.D. Wis.); *Seatrain Lines, Inc.* v. *United States,* 233 F. Supp. 40, 47 (D. N.J.); *Movers' and Warehousemen's Ass'n* v. *United States,* 227 F. Supp. 249, 251 (D. D.C.).

tinued. The Commission was not required, as appellants suggest, to refuse to receive the new schedules for filing until after the suspension order had been formally annulled, since the schedules to which the suspension order applied had already been cancelled by the carrier bureaus pursuant to Commission authorization.[4] Furthermore, the suspension order was not directed at the proposed new rates in the abstract, but rather was entered upon the record made in the original proceeding. There is no sound reason why the discretion to suspend or not to suspend new schedules must be automatically pre-empted by a prior decision on rates of the same level; the better rule, which the Commission followed, is that the new rates stand or fall on the new record that is made.

3. As the court below concluded (J.S. 5a), the Commission's decision not to suspend the new schedules is necessarily only a preliminary determination. Thus, while deciding not to suspend, the Commission has determined that one of the proposed rate schedules should be investigated to ascertain its lawfulness. Appellants are entitled to participate in that investigation and thereafter to seek judicial review of any adverse, final agency action.[5] Moreover, appellants

---

[4] If such a cancellation had not been authorized, the Commission might well have rejected for filing any subsequent tariff. See, *e.g.*, *Cancellation of Joint Fares Between District of Columbia and Nearby Virginia*, 47 M.C.C. 205.

[5] This course was followed by aggrieved parties in *Central and Southern Motor Freight Tariff Ass'n* v. *United States*, 273 F. Supp. 823 (D. Del.), and *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591 (D. D.C.), cited by appellants (J.S. 13).

may test the lawfulness of the rates not covered by the investigation order by following the express administrative remedies afforded them by Section 216 (e) of the Interstate Commerce Act, 49 U.S.C. 316 (e). Until they have availed themselves of such remedies, they cannot be heard to complain (J.S. 5a).[6]

CONCLUSION

The judgment of the district court dismissing the complaints should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT A. HAMMOND, III,
Acting Assistant Attorney General.

HOWARD E. SHAPIRO,
ARTHUR I. CANTOR,
Attorneys.

ROBERT W. GINNANE,
General Counsel.

PHILIP W. GETTS,
RAYMOND M. ZIMMET,
Attorneys,
Interstate Commerce Commission.

FEBRUARY 1969.

---

[6] See, *e.g.*, *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Calif.); *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90-91 (S.D. N.Y.); *Cf. Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540, 544-545; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331917 458

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 3 1969
JOHN F. DAVIS, CLERK

No. 898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., PACIFIC INLAND TARIFF BUREAU, INC., ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION OF PACIFIC INLAND TARIFF BUREAU, INC. TO AFFIRM

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C.
Counsel for Pacific Inland Tariff Bureau, Inc.,
Intervenor-Appellee

February 3, 1969

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	3

AUTHORITIES

Cases:

Arrow Transportation Co. v. *Southern Railway Co.*, 372 U.S. 658 (1963)	4, 5
Eastern Air Lines v. *Civil Aeronautics Board*, 294 F. 2d 235 (D.C. Cir. 1961)	4
National Industrial Traffic League v. *United States*, 287 F. Supp. 129 (D. D.C. 1964)	3
Wisconsin v. *Federal Power Commission*, 373 U.S. 294 (1963)	4

Statutes:

Interstate Commerce Commission

Section 5a, 49 U.S.C. § 5b	2
Section 216(b), 49 U.S.C. § 316(b)	2, 3
Section 216(g), 49 U.S.C. § 316(g)	3

Rules and Regulations:

Rule 200, 49 C.F.R. § 1100.200	4

Miscellaneous:

Organization Minutes of the Interstate Commerce Commission — Organization of Division and Boards and Assignment of Work

Section 7.3	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., PACIFIC INLAND TARIFF BUREAU, INC., ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION OF PACIFIC INLAND TARIFF BUREAU, INC. TO AFFIRM

STATEMENT OF THE CASE

Pacific Inland Tariff Bureau, Inc. (PITB) is the agency through which numerous motor common carriers of prop-

erty, pursuant to an agreement approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, collectively discharge their duty under Section 216(b) of the Interstate Commerce Act, 49 U.S.C. § 316(b), to establish and maintain just and reasonable rates governing, generally speaking, their transportation in the northwestern states of the United States and between those states and California and Arizona. On June 9, 1967, PITB, as agent for its members, published and filed with the Interstate Commerce Commission rate schedules increasing by 5 per cent rates applicable on less-than-truckload shipments, and increasing by 3 per cent rates applicable on truckload shipments, effective July 15, 1967. On July 12, 1967, the Board of Suspension of the Commission, upon protest by Appellants and others, entered an order suspending the operation of the schedules until February 14, 1968, and instituting an investigation of the lawfulness thereof. On July 19, 1967, PITB published and filed supplements to its tariffs, effective August 25, 1967, cancelling the schedules under suspension and investigation. Thereupon, on August 16, 1967, the Board of Suspension entered an order discontinuing the investigation.

On August 7, 1967, PITB published and filed with the Commission new schedules making the same increases of 5 per cent and 3 per cent, effective September 9, 1967. On September 6, 1967, the Board of Suspension, despite protest by the Appellants and others, declined to suspend or investigate the increases. On September 8, 1967, Division 2 of the Commission, upon appeal by Appellants, entered an order instituting an investigation of the lawfulness of the increases. However, it did not suspend their operation and they became effective September 9, 1967.

Thereafter Appellants asked the United States District Court for the District of Columbia to declare the increases in rates effective September 9, 1967, unlawful, the theory

being that the order of suspension of July 12, 1967, was outstanding and valid and that the increases were filed in violation of the Commission's Rules of Practice. On July 22, 1968, the Court dismissed the complaint on the grounds that Appellants had failed to exhaust the statutory remedies afforded them, and that no final agency action subject to judicial review was obtained by Appellants before they sought to invoke the jurisdiction of the Court. *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D. D.C. 1968).

ARGUMENT

Appellants in this appeal pose five questions that they contend are sufficiently substantial to warrant plenary review by this Court. First, they asked whether the suspension provisions of 49 U.S.C. § 316(g) precludes carriers who elect not to defend and, therefore, cancel the suspended rates from republishing the same rates during the period within which the cancelled rates would have been under suspension. The plain answer is no. Appellants do not deny that carriers may choose to cancel rates under investigation and suspension rather than defend them. This is the choice the carriers made here. Having made that choice, there were no schedules on file with the Commission to which its order of investigation and suspension could apply. Hence, the Board of Suspension, under authority delegated to it by Section 7.3 of the Commission's Organization Minutes (Appellants' Jurisdictional Statement, App. F) dismissed the proceedings instituted by that order. The effect of the dismissal was to wipe the slate clean and leave the carriers free to publish and file at any time such new rates as they considered proper—whether higher than, lower than, or the same as, the rates cancelled. To hold otherwise would be to foreclose the carriers from discharging their continuing duty under Section 216(b) of the Interstate Commerce Act to establish and maintain just and reasonable rates.

Appellants next asked whether an Order of the Board of Suspension for continuing an investigation of the lawfulness of rates which have been cancelled can terminate the suspension of the use of the rates. The plain answer is yes. The Commission's authority to issue an order of suspension is clearly ancillary to its authority to enter upon an investigation of the lawfulness of rates. If no investigation is instituted there can be no suspension. So too, if an investigation be terminated, a suspension previously ordered must fall. This would be true in a case in which the Commission terminated an investigation of rates that had not been cancelled, which it may do. (See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963); *Eastern Air Lines* v. *Civil Aeronautics Board*, 294 F. 2d 235 (D.C. Cir. 1961)). *A fortiori*, it is true in this case, in which the investigation was terminated because the cancellation of the rates at issue therein rendered it moot. The fact that the order of termination was issued by the Board of Suspension rather than the Commission itself makes no difference when, as in the case here, the Board has authority to issue the order.

Appellants' third, fourth and fifth questions all rest on the premise that there was an outstanding order of suspension which the Commission disregarded and which the District Court had jurisdiction to enforce. As we have seen, that premise is false. Furthermore, the period of suspension has long since passed, and it is settled that no court has jurisdiction to review the Commission's determination to suspend or not, or to extend the period of suspension beyond the period fixed by the Commission. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

As for the argument that the Commission disregarded its Rules of Practice, which rests on Section 200 of those rules (49 C.F.R. § 1100.200), which permits carriers to seek reconsideration by the Commission of orders of suspension issued by the Board of Suspension, we may assume *arguendo* that Section 200 provides the only meth-

od by which the carriers could have achieved the lifting of the suspension and thereby made the filed and published rates effective. But the carriers did not seek to make the filed and published rates effective. Rather, they chose to exercise their right to cancel the rates and start anew.[1]

When the carriers started anew by filing new schedules to be effective September 9, 1967, fifty-five days later than the originally scheduled date of July 15, 1967, Appellants had and exercised their right to seek investigation and suspension. Upon their protest the Commission ordered an investigation,[2] but decided not to exercise its ancillary power to suspend. In sum, looking at substance rather than form, Appellants are asking the judiciary to reverse that decision. This, no court can do. *Arrow Transportation Co., supra.*

WHEREFORE, Pacific Inland Tariff Bureau, Inc. prays this Court to summarily affirm the judgment of the District Court.

Respectfully submitted,

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004
Counsel for Pacific Inland Tariff Bureau, Inc.,
Intervenor-Appellee

Of Counsel:

REA, GROSS & KNEBEL
917 Munsey Building
1329 E Street, N. W.
Washington, D. C. 20004

[1] The carriers chose this course in order to give themselves time to prepare and submit a better explanation of and justification for increased rates than they had earlier submitted.

[2] Appellants participated in the hearings on the investigation, which is now pending for decision.

SUPREME COURT, U. S.

No. 898

Office-Supreme Court, U.S.
FILED
FEB 20 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C. 20005

Attorneys for Appellant, The National Industrial Traffic League

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017

Attorneys for Appellants, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference

TABLE OF CONTENTS

	PAGE
Statement	2
Argument	4
Conclusion	12

Authorities Cited

Cases:

American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 U.S. 571 11

Arrow Transportation Company v. Southern Railway Company, 372 U.S. 658 2

Cancellation of Joint Fares Between District of Columbia and Nearby Virginia, 47 M.C.C. 205, 208 3

Commodities—Pan-Atlantic Steamship Corp., 313 I.C.C. 23 11

Eastern Air Lines v. C.A.B., 294 F. 2d 235 ..... 10, 11

I.C.C. v. New York, N.H. & H. R.R. Co., 372 U.S. 744 11

Ingot Molds, Pennsylvania to Steelton, Ky., 326 I.C.C. 77 11

Wisconsin v. F.P.C., 373 U.S. 294 ..... 10, 11

PAGE

Statutes, etc.:

49 U.S.C. § 316(e) 9
49 U.S.C. § 316(g) 2, 4
49 U.S.C. § 317 8
Administrative Procedure Act, § 10(e) 8
Rule 200, I.C.C.'s Rules of Practice 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 898

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, appellants submit this brief in opposition to motions filed by the appellees to affirm the judgment of the district court.

Statement

Contrary to the decision of the district court and argument of the appellees, this case presents no issue involving the Commission's discretionary power to suspend rate schedules. Very much in issue are the meaning and effect of an order of suspension once the Commission has exercised its discretionary authority by ordering suspension of rate schedules. Altogether inapposite are *Arrow Transportation Company* v. *Southern Railway Co.*, 372 U.S. 658, and similar cases, relied on in the district court's opinion and in appellees' argument as dispositive of the suit. The action brought by appellants thrusts into critical focus, language of the statute (49 U.S.C. § 316(g)), substantially restated in the suspension order, that articulates the legislative purpose to "suspend the operation of such schedule and defer the use of such rate". The question is whether a suspension order, once entered by the Commission, impinges only on the schedules in which the rates are published or on the rates themselves so that carriers who elect not to defend and who cancel the suspended schedules are precluded from publishing the identical rates whose use was ordered deferred by the unrevoked suspension order.

Of the substantiality of this question there can be no doubt. The challenging problem evoked by the question limned is limited by events that were enacted here. Faced with the Commission order of suspension, the carriers announced:

> "please be advised that member carriers do not choose to defend the general increases under suspension by order of the Commission."

They thereupon cancelled the suspended schedules. Immediately thereafter (in the case of Rocky Mountain, without waiting for the effective date of the cancellation supplement to arrive) they republished the identical rates. The Commission's order which in terms suspended *operation* of the schedules and deferred their *use* was unrevoked, unmodified in any particular, and in full force and effect. In light of the district court's holding that the suspension order was *not* outstanding (JS 4a) it seems appropriate to emphasize that on the date the rates were republished, and for 19 days thereafter, nothing had been done even with respect to discontinuance of the investigation proceeding. The schedules when tendered for filing were thus palpably in violation of the suspension order. As held by the Commission in *Cancellation of Joint Fares Between District of Columbia and Nearby Virginia,* 47 M.C.C. 205, 208, the schedules should have been rejected as illegal—a course apparently acknowledged as proper by US-ICC (Motion, p. 6).

Appellants moved before the Commission to reject the offending schedules. On August 15, 1967, when the petition to reject the schedules was filed, there was no order of discontinuance in existence; the schedules were undeniably illegal; the petition seeking rejection was incontrovertibly well-founded. Yet the Commission arbitrarily refused to entertain the petition to reject the schedules and it was "passed to the Commission's files without action" (JS 17a). If, as appellants suggest, the schedules were illegal, the Commission's function, indeed its duty, was to strike them from its files. There was no need in this suit to ask or seek suspension of the republished rates and appellants do not do so.

The question of statutory construction evoked by these events eluded the district court and is avoided in the motions to affirm. US-ICC cite no case that interprets the critical phrase on which section 316(g) centers—"suspend the operation of such schedule and defer the use of such rate". The question, of obvious substantiality, is one of first impression and merits interpretive study and resolution. In their motion, US-ICC prefer to rest their argument on the dubious thesis that an order discontinuing the investigation proceeding—made after the rates were republished—may be deemed to have revoked the suspension order and may be given retroactive effect to legitimatize the republished schedules.

Argument

1. The threshold statement made by US-ICC in their motion to affirm reveals a basic misconception that infects their argument and, in the end, is fatal to the conclusion they advocate. Of the orders initially issued by the Commission which suspended the carriers' rate schedules, they say (p. 2):

> "although the orders were annulled by the Commission when the motor carriers cancelled the schedules, appellants (shippers) sued to 'enforce' them."

But, the order of suspension was . . .

> not annulled;
>
> not annulled when the carriers cancelled the schedules;
>
> not annulled when the carriers republished the rates.

Clearly visible in the chronology (JS 6) is this sequence of events:

suspension order—July 12th;
cancellation of schedules (published)—July 20th;
republication of the rates—July 27th;
order of discontinuance—August 16th.

It is thus unmistakably plain that on July 27, 1967, when the carriers republished the rates, the order of suspension stood unrevoked and was unmodified even by the order of discontinuance subsequently issued.

The statement of US-ICC includes an unwarranted characterization of the carriers' purpose in republishing the suspended rates. They say (p. 2):

> "Recognizing that they had not sufficiently supported the lawfulness of the proposed rates, the tariff bureaus notified the Commission that, pursuant to the Commission's standing Special Permission No. M-94200 (J.S. 15a-16a), they were cancelling the schedules."

US-ICC seem to be suggesting that the tariff bureaus communicated to the Commission an intention to cancel the schedules in order to republish the same rates with stronger supporting data. This is wholly at variance with the record facts. The reference to JS 15a-16a is merely to the reproduced standing order of the Commission that permits a carrier whose schedule is suspended to cancel the suspended matter on ten days' notice. No reference is supplied to any letter or notice that the carriers sent to the Commission revealing their purpose. On the contrary, the only notification of which the public had any knowledge is that quoted above announcing that the carriers "do not choose to defend the general increases under suspension". So far from suggesting an intention to con-

tinue to support the suspended rate increases, their notice reveals an election to abandon their defense.

2. US-ICC argue (pp. 4-5) that appellants have mounted an attack on the Commission's "sole and exclusive power" with respect to suspension of the republished rates. But appellants' complaint is directed, not to a suspension order that the Commission declined to enter, but to the suspension order that the Commission did enter. Authority to suspend is indeed reposed in the administrative discretion of the Commission. The same cannot be said of authority to *enforce* an order of suspension. The notion that this is a power, exercisable in the uncontrolled discretion of the Commission, is repugnant to the administrative process if not precluded by statutory definition of suspension as Commission action to "defer the use of such rate". The position urged by US-ICC underscores the substantiality of the third question posed by this appeal—is enforcement of a suspension order, as distinguished from issuance of such an order, a matter committed to the discretion of the Commission and not subject to judicial review?

3. US-ICC assert that the order of suspension was "clearly annulled" when the Board entered its order discontinuing the investigation proceeding (p. 4). Difficulties with that position are multiple: (1) the order of discontinuance was handed down, not by the Commission or by a division of the Commission, but by the Board of Suspension to which had been delegated authority to discontinue an investigation proceeding upon cancellation of suspended schedules, but not to vacate an order of suspension; (2) authority to vacate a suspension order was

reserved to the entire Commission as a plenary power or delegated to Division 2 under the appeal procedure established by Rule 200 of the Commission's Rules of Practice (JS 12a); (3) the order of discontinuance was issued by the Board of Suspension after the rates were republished, not before.

US-ICC's position in this respect highlights the substantial nature of the second question presented by this appeal—whether an order discontinuing the investigation proceeding entered by an employee board of the Commission can be deemed effective to vacate the Commission's order of suspension deferring the use of the rates.

US-ICC appear to recognize the difficulty of a position that rests on nullification of an order of suspension under circumstances when the rates under suspension were republished at a time when the order of discontinuance was not in existence. They speak of the status of the suspension order during that period as not "formally" vacated (pp. 5-6) as if it were possible through some undisclosed "informal" means to impart corporeal existence to something wholly invisible.

US-ICC plainly must overcome the dilemma posed by absence of the order discontinuing investigation on the date when the carriers republished the suspended rates. To extricate their argument, US-ICC focus attention on the effective date of the republishing schedules rather than the date of their issuance. This expedient can scarcely suffice. How could it be known on July 27th when the carriers republished the rates that were under suspension if or when an order of discontinuance would be issued by the Commission? On that date the cancellation supple-

ment had not even become effective. The standing Special Permission that authorized carriers to cancel a suspended schedule contained the proviso that the permission so conferred did not "waive or modify any outstanding formal order of the Commission" (JS 15a-16a). On July 27th the carriers, by their act of republication, flew in the face of an outstanding order of suspension that deferred the use of the rate to February 14, 1968. The schedules as presented were illegal. The Commission was called on by appellants' petition to reject them. The Commission passed the petition to its files without action. These infirmities were fatal to republication of the rate increases. They were never cured and could never be cured by subsequent issuance of the order of discontinuance. The schedules, illegal when filed, could not be legitimatized by subsequent entry of the order of discontinuance. That date—August 16, 1967—failed to provide the time needed for statutory compliance by schedules, marked to take effect August 29, 1967, with the mandate of 49 U.S.C. § 317 (c) requiring 30 days' notice of any changes in rates.

It is for these reasons that the ultimate argument presented by US-ICC is not sustainable. They misapprehend the gravamen of this complaint, viewing it as a bid for judicial review of the Commission's refusal to suspend the republished rates. US-ICC would relegate appellants to exhaustion by means of a formal complaint. Appellants have invoked the jurisdiction of the district court, not to review the Commission's refusal to suspend, but to deal with its inaction in the face of violations of the order that did suspend. The court was asked to implement § 10(e) of the Administrative Procedure Act which requires the reviewing court to compel agency action

unlawfully withheld, to set aside agency action found arbitrary or not in accordance with law and without observance of procedure required by law. The argument of US-ICC supports the substantiality of the fifth question presented by this appeal—may parties aggrieved by Commission action obtain mandatory injunctive relief based on enforcement of the terms of an outstanding suspension order or are they required to suffer rates effected in contravention of the suspension order while exhausting remedies under formal complaint procedure?

4. The motion of US-ICC includes argument that tends to lend force to the essentiality of the interpretation question that inheres in Section 316(e). They say (p. 6):

> "Furthermore, the suspension order was not directed at the proposed new rates in the abstract, but rather was entered upon the record made in the original proceeding. There is no sound reason why the discretion to suspend or not to suspend new schedules must be automatically pre-empted by a prior decision on rates of the same level;"

These alternative consequences are hinged to the meaning that must be imparted to "suspend the operation of such schedule and defer the use of such rate". The argument of Pacific Inland Bureau (pp. 3-4) serves to concretize the problem of statutory interpretation presented by this appeal, i.e., does Section 316(e) speak to the schedules that are suspended or the rates contained in the schedules? Pacific Inland declares that it makes no difference that the order of termination was issued by the Board of Suspension rather than Commission when the Board has authority to issue the order (p. 4). This asserts as a fact something that is very much in issue in this case. The

Board was vested with authority to enter an order of discontinuance, not to vacate an order of suspension.

The argument made at page 3 merits special comment. Pacific Inland says:

> "The effect of the dismissal was to wipe the slate clean and leave the carriers free to publish and file at any time such new rates as they considered proper—whether higher than, lower than, or the same as, the rates cancelled."

On August 7th when Pacific Inland did "publish and file" new rates, the slate was not wiped clean, absent an order discontinuing the investigation. That order was issued August 16th and served August 22nd. Responding to the empirical view with which a tariff bureau would be expected to be familiar, Pacific Inland (unlike US-ICC) correctly describes the significant acts of the carriers as the *publishing* and *filing* of the new schedules.

5. Pacific Inland questions the viability of the suspension order in the presence of an order discontinuing the investigation proceeding. This point is dealt with at JS 9-10. It merits this additional comment. At page 4 Pacific Inland argues that if no investigation is instituted, there can be no suspension, citing *Wisconsin* v. *F.P.C.*, 373 U.S. 294, and *Eastern Air Lines* v. *C.A.B.*, 294 F. 2d 235. The cases are inapposite. Each involved determinations made by the respective regulatory agencies to discontinue investigation proceedings long after the making of an evidentiary record. Indeed, in *Wisconsin* the court refers (p. 305) to that Commission's determination of the Section 4(e) dockets as a decision on the merits. In *Eastern* the court observed (p. 237) that the hearing was lengthy and

extensive. The challenge in the cited cases was to the agencies' authority to discontinue the proceeding without arriving at a definitive conclusion with respect to the rates under investigation. The cases that are pertinent to the issues presented here are not *Wisconsin* or *Eastern,* but those which hold that a Commission order which discontinues the proceeding may leave in force a directive contained in the same order or in another order which commands the carrier to cease and desist from applying certain rates. This Court has frequently reviewed decisions and orders of the Interstate Commerce Commission and has been asked to and has rendered justments as to the lawfulness of orders which had been entered in proceedings in which the same order or subsequent orders served by the Commission "discontinued the proceeding". Thus, *American Commercial Lines, Inc.* v. *Louisville & N. R. Co.,* 392 U.S. 571, reviewed an order of the Commission in *Ingot Molds, Pennsylvania to Steelton, Ky.,* 326 I.C.C. 77, which ordered schedules cancelled and the proceeding discontinued. The same was true in *I.C.C.* v. *New York, N.H. & H. R.R. Co.,* 372 U.S. 744. Here the court reviewed an order of the Commission rendered in *Commodities—Pan-Atlantic Steamship Corp.,* 313 I.C.C. 23, which ordered rates cancelled and the proceeding discontinued. The continuing effectiveness of orders issued by the Commission in those proceedings was not "annulled" by the issuance of an order stating that the proceedings had been discontinued.

CONCLUSION

Appellants suggest that the questions presented on this appeal are substantial and merit plenary review.

Respectfully submitted,

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C. 20005

Attorneys for Appellant,
The National Industrial Traffic League

ARTHUR A. ARSHAM
233 Broadway
New York, New York 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, New York 10017

Attorneys for Appellants,
The National Small Shipments Traffic Conference, Inc. and Drug & Toilet Preparation Traffic Conference

February 19, 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

NATIONAL INDUSTRIAL TRAFFIC LEAGUE ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 898. Decided February 24, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.